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No. 08-750

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAIME DURAN FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

EDWIN T. ARADI
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, Texas 75201
(214) 969-2800

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR THE PETITIONER

In its opposition, the Government concedes that the circuit courts of appeal are split on the question presented: whether a *Batson* claim first raised on appeal is reviewable under the plain error standard, or whether the claim is waived and unreviewable. Rather than explain why resolution of the split is not worthy of this Court's attention, the Government argues that certiorari should be denied because the petitioner could not win under the plain error standard. That argument, though, goes to the merits of petitioner's *Batson* challenge, rather than what should be the proper standard of review.

As shown in the petition and below, the majority of circuit courts properly have held that Rule 52(b)'s plain error standard should apply, and the Government has, in fact, taken that position in other cases. Moreover, claimants such as Mr. Flores can prevail under that standard where, as here, the Government has struck all panel members of the minority defendant's race and there were no answers given during voir dire to differentiate minority and non-minority panel members. Under these circumstances, the Government could never proffer non-verbal, race-neutral bases for striking all minority panel members with a chance of being empanelled. Accordingly, Mr. Flores can prevail on his *Batson* challenge under this "empty" record, and, more importantly, certiorari is warranted to resolve the split among the circuit courts, state courts, and the Government itself.

1. a. The Government hardly addresses petitioner's reason for seeking certiorari: to resolve a circuit split on whether a *Batson* claim may be reviewed under Rule 52(b). The Government does not dispute that the Fifth Circuit's decision here (as well as similar holdings of three other circuit courts) conflicts with the holdings of seven circuit courts. Instead, the Government argues that the Fifth Circuit's holding that such a claim is unreviewable on appeal is correct, without addressing why certiorari is unwarranted to resolve the split.

A minority defendant's ability to preserve important constitutional rights to a fair jury trial – and not having all members of his same race removed via peremptory challenges – should not vary on the happenstance of where his trial occurs. It is not the case, as the Government argues, that treating an unpreserved *Batson* challenge as waived "will rarely, if ever, prove consequential." BIO at 9. It certainly has consequences for Mr. Flores, the disproportionately large number of Hispanic defendants in the Fifth Circuit and elsewhere, and the public's perception of the judicial process. This Court should take the opportunity to set a proper national standard for the review of *Batson* claims where appointed trial counsel fails to raise plain error.[1]

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[1] The Court can also take this opportunity to resolve a split among the state courts. The Government argues that the factual scenarios in the cases cited by petitioner are inapposite, but those are differences that make no difference to the issue of

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b. Plain error properly applies to unpreserved *Batson* claims. Because a minority defendant's *Batson* rights arise under the constitution, it is especially important that courts zealously protect opportunities to vindicate those rights. *See United States v. Frady*, 456 U.S. 152, 163 (1982) (holding that the plain error standard was "intended to afford a means for the prompt redress of miscarriages of justice"). As demonstrated in the petition (at 16-17), this Court has found plain error applicable in cases involving a number of errors less significant than the *Batson* rights at issue here. In cases involving constitutional rights, federal courts have generally been more willing to apply the plain error standard, and, in fact, have indicated that this standard is applied "less rigidly when reviewing a potential constitutional error." *See United States v. Handakas*, 286 F.3d 92, 111 (2d Cir. 2002) (quoting *United States v. Easter*, 981 F.2d 1549, 1557 (10th Cir. 1992)). Indeed, there is no principled reason, and the Government has not presented one, for denying plain error review for *Batson* claims. As shown in the petition, minority defendants such as Mr. Flores can prove each element of Rule 52(b), and can prove a *Batson* violation on the face of the record.

The Government makes light of the decisions of the majority of circuit courts applying the plain error

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granting certiorari. The fact remains that some state courts allow plain error review and others preclude it. Certiorari is warranted to unify federal and state courts' treatment of *Batson* claims under the plain error standard.

standard, arguing that plain error review was appropriate in those cases only because there were race-neutral bases apparent on the face of the record justifying the Government's strikes. BIO at 6. Notably, nowhere do those courts of appeal state that they are reviewing under the plain error standard for that reason. Instead, those courts only go through the exercise of examining the record once they already had determined that plain error review applied. After a review of the record, some of those courts found that the Government could point to race-neutral bases for striking the minority jurors. Thus, the minority defendants lost in some of those cases, but at least they were afforded review on the merits, unlike Mr. Flores.

Here, the fact that the Government cannot point to race-neutral bases in the record should not militate in favor of denying review. The opposite should be true: plain error review is especially warranted, and the minority defendant should be able to prevail, when there is a complete record of voir dire and nowhere is there any verbal responses from minority panel members to differentiate them from non-minority panel members. Under such an "empty" record, the Government cannot, as a matter of law, justify striking all members of the minority defendant's race who have a chance of being empanelled.

2. a. Even though the Court's focus should be on what standard applies – rather than whether petitioner could meet that standard – petitioner could prevail on his *Batson* challenge.

The Government does not challenge that two of the three elements of Rule 52(b) are met: that Fourteenth Amendment-conferred *Batson* rights are substantial, and that a violation of *Batson* affects the fairness, integrity, or public reputation of judicial proceedings. That leaves only the question of whether there was plain error.

As to that issue, the Government has not challenged the *prima facie* elements of a *Batson* challenge: Mr. Flores is a member of a cognizable racial group, the Government used peremptory challenges to remove panel members of his race, and other relevant circumstances to raise an inference that peremptory challenges were used to exclude panel members based on race. *See* petition at 10-11. The Government also does not challenge that Mr. Flores can demonstrate that both he and panel members can be identified as Hispanic by using census bureau data on Hispanic surnames. *Id.* at 12-14.

b. Having all but conceded those issues, the Government focuses its argument on the fact that, because appointed trial counsel did not object to the exclusion of Hispanic jurors, the Government was never made to proffer race-neutral bases for its strikes. Notably, the Government does not direct this Court to any race-neutral bases for its strike of the Hispanic panel members, as was done in the seven courts of appeal cases utilizing plain error review. And the fact that the Government or the Court did not have a chance to address the perceived error after a contemporaneous objection should not mean that

the issue is unreviewable; if that were true, then Rule 52(b) – which applies *only* when error is *not* presented to the trial court – would be rendered superfluous.

But, more importantly, the case law demonstrates that the Government cannot, as a matter of law, proffer race-neutral bases for striking every minority juror when those minority jurors answer questions during voir dire consistently with non-minority jurors. *See, e.g., Snyder v. Louisiana*, 128 S. Ct. 1203 (2008) (rejecting race-neutral bases when excluded African-American juror answered questions consistently with white jurors); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (rejecting race-neutral bases when 91% of African-American jurors excluded); *Montiel v. City of Los Angeles*, 2 F.3d 335, 340 (9th Cir. 1993) (rejecting race-neutral bases when "all jurors with Spanish surnames were peremptorily struck from the panel"). In other words, when there is nothing in the record that would differentiate minority and non-minority jurors, there is nothing the Government possibly could have said (*e.g.*, non-verbal clues, appearance, gut feeling, *etc.*) that could serve as race-neutral bases to justify striking all three Hispanic panel members with a mathematical chance of being empanelled.

c. With the record providing no race-neutral bases for striking all Hispanic jurors, Mr. Flores can meet the plain error standard. More importantly, he should have access to meaningful appellate review. Seven circuit courts have found that Rule 52(b)

should apply in such circumstances, and there is no principled reason why it should not here. While it may be difficult to prevail under that standard in many cases, that is not a principled reason for refusing to make such review available. Certiorari is warranted to align the federal and state courts on this issue. And, indeed, it is warranted to make the Government's position consistent, as well. *See United States v. Brown*, 352 F.3d 654, 663 (2d Cir. 2003) (wherein the Government agreed that plain error review is appropriate); *United States v. Stephens*, 421 F.3d 503, 510-11 (7th Cir. 2005) (wherein the Government agreed to attempt to proffer race-neutral bases for strikes for first time on appeal).

CONCLUSION

Because of the split among the circuit courts of appeal, state appellate courts, and the Government's position, certiorari should be granted.

Respectfully submitted,

EDWIN T. ARADI
Counsel of Record
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, Texas 75201
(214) 969-2800

Attorney for Petitioner